IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3643 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRAVINBHAI AMBALAL PATEL

Versus

KADI MUNICIPALITY

Appearance:

1. Special Civil Application No. 3643 of 1992

MR PH PATHAK for Petitioner No. 1

NOTICE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 20/02/2004

ORAL JUDGEMENT

The petitioner has filed this petition under Article 226 of the Constitution of India seeking direction from this Court to the respondent Municipality

to regularise the services of the petitioner from the initial date of appointment and grant all consequential benefits to the petitioner with 12% interest. The petitioner has also prayed for the direction to the respondent Municipality to pay the arrears of wages etc. to the petitioner considering him as regular employee of the respondent Municipality from the initial date of appointment. By way of an amendment, the petitioner has also prayed for the declaration from this Court to the effect that the impugned action on the part of the respondent Municipality of verbal termination of the service of the petitioner with effect from 01.06.1992 was illegal and invalid and inoperative in law and has also prayed for quashing and setting aside the said action of the respondent Municipality and directing it to reinstate the petitioner in service and grant all consequential benefits.

2. It is the case of the petitioner that petitioner was given an appointment order on 26.09.1990 / 08.10.1990 issued by the Deputy Director of Training appointing the petitioner as Apprentice in Kadi Municipality. On completion of one year period, the petitioner has given an application to the President of respondent Municipality requesting to continue him in service looking to his satisfactory work. The petitioner was given appointment order by the respondent dated 22.11.1991 for a period of one month in the tax department as Tax Clerk as daily rated employee. The respondent Municipality has adopted a practice of giving a day or two artificial break in the service of the petitioner though he was absorbed after his completion of successful apprenticeship period. The petitioner has completed more than 240 days of service and hence, the petitioner was entitled to be regularised. It is further alleged that when the petitioner has requested the respondent to continue him in service, the respondent has stated that he would not be continued any further as one Mr. Tarunkumar Jasubhai was to be accommodated at the place of the petitioner though Mr. Tarunkumar was junior to the petitioner.

3. The petitioner has further submitted that in number of other cases, the petitions filed by the petitioners have been entertained by this Court and by way of an example, the petitioner has quoted the instance of the petitioner in S.C.A. No. 8376 of 1990 and that petition has been admitted by this Court. It was submitted that after filing of the present petition, the respondents have verbally terminated the services of the petitioner with effect from 01.06.1992. The said

termination was in violation of first-cum-last go and many juniors to the petitioner were continued in the service of the respondent. No notice whatsoever was given to the petitioner before terminating the services of the petitioner. Despite the fact that the respondent Municipality was under obligation to give one month's notice, the said notice was not given to the petitioner. It has, therefore, been urged before the Court that the respondent Municipality be directed to regularise the services of the petitioner and to quash the verbal order of termination and to grant all consequential benefits with 12% interest.

4. The petition was admitted by this Court. An affidavit-in-reply was filed by the Chief Officer of the respondent Municipality. It was stated in the said reply that petitioner was appointed as Apprentice in the Municipality by order dated 23/25.10.1990 at the monthly stipend of Rs.380/- for the period upto 31.08.1991. The petitioner was further appointed as Apprentice from 01.09.1991 to 31.10.1991 by a separate order. The petitioner was also appointed as daily wager from 22.11.1991 to 21.12.1991 in the Tax Department. Again he was appointed in the same department from 23.12.1991 to 22.01.1992, 27.01.1992 to 26.02.1992, 01.04.1992 to 30.04.1992, 04.05.1992 to 31.05.1992. There was heavy work load in the Tax department and, therefore, the petitioner was continued from time to time as daily wager in the same department. The said work load was reduced thereafter and hence, there was no need of any extra daily wager and hence, respondent Municipality has not continued the petitioner as daily wager. The petitioner has not completed even 240 days as daily wager in a year and, therefore, he could not be given any right to be absorbed in the department of the Municipality.

5. The petitioner has worked as Apprentice in the Municipality for about 1 year and he has been given work as daily wager in the Municipality. It has been further stated that there was no assurance given by the respondent Municipality that on account of satisfaction of his work, he had been continued in the tax department. It has also been contended that the petitioner's remuneration could not be compared with other clerks of the tax department of the respondent Municipality because the petitioner was appointed solely on daily wage basis. The petitioner has no right to claim that he should be regularised in the respondent Municipality and, therefore, there was no question of granting equal pay for equal work. With regard to the grievance raised by the petitioner in case of petitioner's Juniors having

been absorbed, it was stated that Mr. Tarunkumar was not accommodated in place of the petitioner as he has been given some other work. It has been specifically denied that any Junior person to the petitioner has been accommodated in place of the petitioner due to political pressure.

6. The petitioner has also filed rejoinder before this Court denying the contentions raised by the respondent Municipality in reply. The respondent has filed sur-rejoinder dealing with the contentions raised by the petitioner and by way of an amendment in the petition, it was stated that petitioner was junior most daily wager in the tax department. The purpose of terminating the service of daily wager in a department, Municipality considered the seniority of daily wager in the respective department and hence, Municipality was not supposed to give one month notice and therefore, the contention of the petitioner that without following the provisions of Articles 14 & 16 of the Constitution of India, the petitioner was terminated was not correct. It was also contended that some clerks of Octroi department were given work in tax department as requirement of clerks in the Octroi department was only 29 in number. However, by orders passed by various Courts, there were 46 clerks in the Octroi department and, therefore, some clerks of Octroi department were given work in the tax department temporarily. The respondent Municipality has also dealt with other instances quoted by the petitioner in the Rejoinder and submitted that attempt made by the petitioner in the rejoinder was totally to mislead the Court.

7. After having considered the contentions raised and submissions made in the pleadings and after giving my anxious thoughts to the issue raised in the petition, I am of the view that this is not a fit case wherein the relief claimed by the petitioner can be granted. The petitioner could not establish the fact that he has got any permanent right to claim regularisation in the respondent Municipality. He was initially an Apprentice and thereafter was appointed as daily wager for some time. It was the case of the Municipality that as and when the work was necessary and more particularly, when there was heavy work load in the tax department, the petitioner was absorbed and work was taken from him and that could not confer any right on him to claim regularisation. Even otherwise, the Court is not convinced with the submission that Junior to the petitioners were retained in the Municipality as the instances quoted by the petitioner were duly and properly

explained by the respondent Municipality in the sur-rejoinder. Even otherwise, looking to the financial position of the respondent Corporation at the relevant point of time, and even when this petition is decided, the respondent Municipality cannot be compelled to absorb the petitioner on regular basis especially when no prima facie case is made out to that effect. As per petitioner's own say, oral termination order was passed in 1992 and more than 12 years have passed since then. The Court is very reluctant to pass an order in such case for regularising the services of the petitioner especially when the petitioner has put up the service of only few months.

8. Considering the facts and circumstances of the case, the Court is not inclined to accept the claim of the petitioner and hence, petition is dismissed. Rule discharged without any order as to costs.

[K.A. PUJ, J.]

9. After the above judgment is dictated in the open Court and before it is transcribed and/or signed, Mr. P.H. Pathak, learned advocate appearing for the petitioner has submitted that the impugned oral termination is in violation of the statutory rules with regard to maintainance of seniority list. The respondent Municipality has not followed the general seniority list of the Clerks to be maintained in the Municipality. No notice whatsoever was given to the petitioner before terminating the services of the petitioner. In this connection, he relies on the decision of the Bombay High Court in the case of NAVBHARAT HINDI DAILY, NAGPUR V/S. NAVBHARAT SHRAMIK SANGHA AND ANOTHER, 1984 LAB.I.C. 445 wherein it is held that " Rule 81 of Industrial Disputes (Bombay) Rules framed under the Act deals with the maintainance of seniority list of workman. It says that the employer shall prepare a list of workmen in the particular category from which respondent is contemplated, arranged according to the seniority of their service in that category, and cause a copy thereof to be posted on the notice board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment. The Court has further stated that it is an accepted principle of industrial law that in ordering retrenchment, ordinarily the management should commence with the latest record and progressively retrench employees higher up in

the list of seniority. In order to achieve this principle, the seniority list has to be prepared by an employer in accordance with Rule 81 of the Rules. The intention behind exhibiting such a list is to allow workmen to object to the same and thereby avoid hardship which may result as a consequence of retrenchment. The list to be exhibited in accordance with the rule obviously is for the reason to protect the interest of workman. It further provides the safeguard against contravention of the rule of "last come first go", which is ordinarily required to be followed. The Court has, therefore, held that in these circumstances, it can never be said that the rule does not cast any obligation on the employer to strictly follow the said rule. In the case before the Bombay High Court, no such list was exhibited by the petitioner and, therfore, the Industrial Tribunal was right in coming to the conclusion that the petitioner had contravened Rule 81 of the Bombay Rules framed under the Act.

10. Mr. Pathak has further relied on the decision of the GAFFAR AND OTHERS V/S. UNION OF INDIA AND OTHERS, 1983 (2) L.L.J. 285 wherein it is held that "The Provision has been included in the Rules so that the object of Section 25 of the I.D. Act may be effectively achieved. The industrial rule relating to retrenchment of "last cum, first go" where other things are equal has been recognised for long and affords a healthy safeguard against discrimination. This principle was given statutory recognition by amendment of the Act in 1953. The rule 77 was framed with a view to facilitate a retrenched workman to verify that he is not being discriminated against, otherwise it may be impracticable for him to collect relevant information and enforce his right. The minimum time of 7 days allowed for this purpose is not unnecessarily long, for the workman who get an addequate opportunity to scrutinise the correctness of the seniority list before he is thrown out. Viewed from this angle it should be held that the requirement mentioned in Rule 77 is mandatory and its violation renders an order of retrenchment illegal."

11. Over and above the aforesaid judgments, Mr. Pathak has further submitted that similar issue was raised by the respondent in the case of KALOL TALUKA PANCHAYAT V/S. BHARATBHAI J. DAVE in L.P.A. No. 1189 of 2003 which was already heard on 02.02.2004 and the judgment is awaited. On inquiry, however, it is found that the said matter is still not decided and is pending for judgment.

12. On the basis of the aforesaid judgments and statutory rules, Mr. Pathak has submitted that the impugned order of oral termination deserves to be quashed and set aside and the petition be allowed.

13. The Court has duly considered the above submissions of Mr. Pathak. However, the above decisions are not applicable to the facts of the present case as in the case on hand, the petitioner was initially an Apprentice and thereafter, he was appointed as daily wgaer from 22.11.1991. The said appointment was for a specific period and three to four times such appointment as daily wager was made for a specific period and the last appointment was for the period from 04.05.1992 to 31.05.1992. After this date, there was no appointment order issued in favour of the petitioner. When the said period came to an end, no further appointment order was issued and hence, it cannot be said that the petitioner's service was terminated. Even otherwise, initially, the petitioner has not raised that ground before this Court. It is only by way of an amendment in the petition, the petitioner has stated that the petitioner was orally terminated. Since the petitioner was a daily wager and his appointment was for a specific period and even there is a disputed question of fact as to whether he has completed 240 days in a year or not, it cannot be said that the petitioner's service was orally terminated without following the statutory rules framed under the Act. As against the petitioner's contention raised in the petition regarding violation of the principle of last cum first go, the respondent Nagarpalika has denied that the said principle has been violated. It was stated in the Affidavit-in-reply that the petitioner was the Junior most in the Tax Department. Since many disputed questions of facts were raised by the petitioner in this petition which cannot be gone into by this Court while exercising extra ordinary writ jurisdiction under Article 226 of the Constitution of India and the petitioner, instead of approaching to the Labour Court raising all his grievances and proving his case by leading all necessary evidence before the Labour Court, the petitioner has approached this Court and in absence of any relevant material and documentary evidence, it is difficult for this Court to uphold the contention raised by the petitioner that no seniority list was maintained and that he has completed 240 days in a year and that he was orally terminated in violation of the provisions contained under the Industrial Dispute Act as well as the rules framed thereunder.

14. Even otherwise, the Division Bench of this Court

in the case of HALVAD NAGARPALIKA AND OTHERS V/S. JANI DIPAKBHAI CHANDRAVADANBHAI AND OTHERS in L.P.A. No. 1202 of 2002 and other allied matters decided on 08.05.2003 wherein this Court was at pain to observe that the Panchayats, Nagarpalikas, Municipalities and/or Govt. Corporations as well as Govt. Establishments are facing severe financial crisis only because of overhead which may be required for the time being but to make them permanent would definitely affect adversely to the financial substratum of the respective organisation. The Court has further observed that the Court should not be a party to such illegal or irregular appointments by allowing the persons so appointed at the cost of the public exchequer. While deciding the said matter, the Court has considered the decision of the Hon'ble Supreme Court in the case of HIMANSHU V/S. STATE OF BIHAR AND OTHERS - (1997) 4 S.C.C. 391 wherein the main grievance of the petitioners was that termination of the services was in violation of Section 25F of the I.D. Act, 1947. The Hon'ble Supreme Court has observed that the persons, whose services were terminated, were not appointed to the posts in accordance with the rules but were engaged on the basis of need of work. They were temporary employees working on daily wages and in those circumstances, their disengagement from service could not be construed to be a retrenchment under the I.D. Act. It was further held by the Hon'ble Supreme Court that the concept of retrenchment therefore cannot be stretched to such an extent as to cover the said employees. While negativing the contention of the petitioners in that case that the termination of their services was arbitrary, the Hon'ble Supreme Court has held that they were only daily-wage employees and had no right to the posts and hence their disengagement was not arbitrary."

15. In the above view of the matter, I am unable to accept the submissions made by Mr. Pathak, learned advocate appearing for the petitioner and I do not think it fit and proper to make any change in the judgment which I have already dictated hereinabove. It is, however, open to the petitioner to raise all these disputed questions of facts before the Labour Court. The Labour Court may go into it, if so raised and decide it in accordance with law.

16. Since the matter was heard at length and judgment was also dictated at two stages, it is not just or appropriate for this Court to allow the petitioner to withdraw this petition.

[K.A. PUJ, J.]

#Savariya#

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